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November 29, 2018

Ms. Josie Bahnke
Director
Division of Elections
240 Main Street, Ste. 400
Juneau, Alaska 99811-0017

Re: Kathryn Dodge Position Statement Regarding Two Uncounted Ballots

Dear Ms. Bahnke:

Our firm represents Ms. Kathryn Dodge, candidate to represent District 1 in the Alaska House of Representatives. We sincerely appreciate the Division's hard work throughout the ballot counting process and look forward to working with you to complete it. We understand a recount in the House District 1 race is currently scheduled to occur on Friday, November 30. This letter is intended to address in advance two ballots that Ms. Dodge believes should be included in the recount.

1. **The loose ballot from Precinct 6 should be counted unless there is conclusive evidence supporting its disqualification.**

There is one ballot that appears to have been cast in Fairbanks Precinct 6, but which was not counted or included in the results that were certified on Monday, November 26. You indicated that the Division was "still investigating" that ballot and that no determination has been made whether to count it. We understand this decision to continue the investigation was not a final determination on whether to include the ballot in the recount.

We believe the Division should rule on that ballot prior to completing the recount on Friday and certifying a result. If the Division fails to rule on the ballot, then it would effectively be making a decision by default---a decision to disqualify the ballot. In other words, the result of non-action would be to disqualify a ballot without making any findings supporting that decision. Given the high threshold needed to disqualify a ballot

under Alaska law, we do not believe the ballot can or should remain uncounted unless the Division makes clear affirmative findings supporting a decision not to include it in the recount.

Ms. Dodge also believes that disqualifying the ballot would be inconsistent with long-standing Alaska law unless there is conclusive evidence that the ballot was not legally cast.[1] The right to participate in the democratic process and to have one's vote counted is fundamental; the "overriding principal is that the voter shall, ordinarily have his vote recognized...."[2] To that end, "the burden of proving a vote should not be counted is on the challenger to that vote."[3] Carrying this burden requires a challenger to identify a specific statutory or constitutional basis for disqualifying the ballot (and disenfranchising the voter who cast it), bearing in mind that Alaska law requires every reasonable inference and construction of election laws to be made in favor of counting the ballot.[4] In short, the Division should count a ballot unless there is conclusive evidence that it cannot lawfully be counted.[5]

Neither party has provided any evidence to overcome the presumption in favor of counting the ballot from Precinct 6, or to carry the burden of proving it should not be counted. Nor does the ballot contain any indication on its face that it is invalid. The ballot should therefore be included in the recount unless the Division has (and provides to the parties) conclusive evidence that it is not valid under Alaska law. Our understanding is that no such evidence exists, and that in fact, the most likely scenario is that the "loose ballot" was validly issued and marked by a voter who apparently placed it in a secure box with the questioned ballots (or gave it to a poll worker who did so) instead of placing it in the optical scanner. This explains why 366 ballots were issued on election day, but only 365 were run through the optical scanner.

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[1] *Fischer v. Stout*, 741 P.2d 217, 224 (Alaska 1978) (evaluating evidence of two voters' eligibility under a "conclusive" and "convincing" standard, and evidence that would disenfranchise another voter under a "clear and unambiguous" standard).

[2] *Nageak v. Mallot*, 426 P.3d 930, 941 (Alaska 2018).

[3] *Edgmon v. State,* 152 P.3d 1154, 169 (Alaska 2007).

[4] *Miller v. Treadwell*, 245 P.3d 867, 870 (Alaska 2010) ("We have consistently construed election statutes in favor of voter enfranchisement."); *Carr v. Thomas*, 586 P.2d 622, 625-26 (Alaska 1978) ("There is well-established policy which favors upholding of elections when technical errors or irregularities arise in carrying out directory provisions which do not affect the result of an election.").

[5] *Miller*, 245 P.3d at 869 (noting that the purpose of the statute governing write-in ballots is "inclusive, not exclusive; it is designed to ensure that ballots are counted, not excluded. And this inclusiveness is consistent with the overarching purpose of an election: to ascertain the public will."); *Carr*, 586 P.2d at 626 (holding that election laws should not be read in an overly technical manner in order to overturn the result).

We may never know exactly why that mistake occurred, but it's not necessary to construct a hypothetical scenario to justify counting the ballot.[6] Quite the opposite: the burden is to prove that the ballot should not count. Mere speculation, hypotheticals, or vague claims that "something doesn't seem right" are not sufficient to carry that burden or to disenfranchise the voter who cast the ballot. The voter should not be disenfranchised because of mere mistake.[7] Therefore, absent conclusive evidence showing the ballot is unlawful, it must be included in the recount.

2. The ballot with an "X" through one candidate's oval is not an overvote.

Ms. Dodge challenges the Division's decision to treat what appears to have been a vote for her as an impermissible overvote. The voter who completed the ballot in question filled in the ovals next to both candidate Dodge and candidate LeBon, but also crossed out the filled-in oval next to candidate LeBon. As a matter of common sense and Alaska law, these markings indicate an intent to vote for Ms. Dodge, not an intent to vote for both candidates.

The Alaska Supreme Court has provided significant guidance on how this ballot should be analyzed. To determine whether a ballot with markings in both candidates' ovals should be considered an overvote, the Court has said "The crucial question in determining the validity of ballot markings is one of voter intent."[8] In *Edgmon v. State*, the Court provided the following analytical roadmap that applies equally here:

> [AS 15.15.360(a)(1)] limits the ways a voter may "mark" a ballot to " 'X' marks, diagonal, horizontal, or vertical marks, solid marks, stars, circles, asterisks, checks, or plus signs that are clearly spaced in the oval opposite the name of the candidate." Subsection .360(a)(5) further clarifies which marks meeting the requirements of (a)(1) should be counted as votes, providing that "[t]he mark specified in (1) of this subsection shall be counted only if it is substantially inside the oval provided, or touching the oval so as to indicate clearly that the voter intended the particular oval to be designated.

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[6] We note however that the scenario in the previous paragraph explains why one more ballot was issued than was cast at Precinct 6. It is much more likely that a voter or election worker put the properly marked ballot in the wrong box than it is a voter left without casting a ballot (nor would this theory explain why the ballot was in the box). Moreover, there is no evidence that the ballot should have been treated as a questioned ballot because we understand all questioned ballots are accounted for.

[7] *Edgmon*, 152 P.3d at 1157.

[8] *Id.*

> Reading these provisions together, an overvote occurs if the voter has voted for two candidates with "marks" as defined by subsection .360(a)(1) that clearly indicate the voter's intent to vote for more than one candidate. Because a mark meeting the requirements of subsection .360(a)(1) cannot be counted unless the voter's intent is clear, we begin by analyzing whether the second mark on each overvoted ballot clearly indicated the voter's intent to vote for a second candidate.[9]

This analytical framework applies here because the question is "[w]hether the Division appropriately categorized the ballot[] as containing [an] overvote[]...."[10] In order to categorize the "X" as an overvote (and therefore disqualify the vote for House District 1), the Division must be able to say with confidence that the ballot "clearly indicate[s] the voter's intent to vote for a second candidate."

Here, the evidence does not suggest that the voter intended to vote for two candidates in House District 1. As far we know, the voter who completed the ballot cast all of his or her other votes by filling in the ovals next to a candidate's name; he or she did not use an "X" to cast any other votes.[11] The only oval he or she put an "X" over was the filled-in oval next to Mr. LeBon's name. Because the voter has demonstrated his or her ability and intent to cast a vote by filling in ovals in every other race, it is unreasonable to conclude that the "X" through the filled-in oval next to Mr. LeBon's name was intended to cast a vote for him.[12] Rather, common sense suggests that the "X" was intended to indicate that the voter did not intend to cast a vote for Mr. Lebon. The fact that the voter was filling out an absentee ballot makes this interpretation all the more likely because it would have been impractical for the voter to destroy the ballot and fill out a new one.

In *Edgmon v. State*, the Alaska Supreme Court relied on a similar case from Maine in which a voter had placed an "X" next to two candidates' names, but had scribbled over one "X." "The court reasoned that scribbling out...is a common method used by voters to retract a cast vote, and noted that it was unlikely that the voter intended to vote for two candidates for the same office."[13] The same reasoning applies

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[9] *Id.* at 1156-57.

[10] *Id.* at 1156.

[11] *Id.* at 1158 ("A review of the entire ballot therefore suggests that the voter understood the rules and used a completely shaded oval -- not a trace of an edge of the oval -- to indicate a vote.").

[12] *In re Primary Election Ballot Disputes 2004*, 857 A.2d 494, 504 (Me. 2004) ("Given the voter's demonstrated ability to comply with the instructions and fully darken ovals when voting, we cannot reasonably interpret this mark as anything other than a stray marking.").

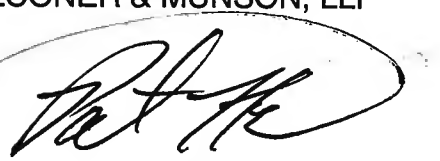
[13] *Edgmon*, 152 P.3d at 1157; *In re Primary Election Ballot Disputes 2004*, 857 A.2d at 503.

to the ballot in question here because, as the same Maine case cited by the Alaska Supreme Court stated, "Scribbling out, making an X, or making an asterisk over a marked vote indicator are all common methods used by voters to retract a cast vote."[14] In short, the Maine Supreme Court cited by the Alaska Court believed that an "X" signified an intent to retract a vote, not cast a second one in the same race. And because "only marks clearly indicating an intent to vote [can] be counted as votes" in Alaska, the "X" on the ballot in this race cannot be counted as an overvote. The ballot should be counted for Ms. Dodge.

We sincerely appreciate the Division's time and attention to this important matter and are available at any time to discuss this with yourself and Mr. LeBon or his representatives.

Very truly yours,

BOYD, CHANDLER
FALCONER & MUNSON, LLP

By: 

Patrick W. Munson
Attorney for Kathryn Dodge

[14] *In re Primary Election Ballot Disputes 2004*, 857 A.2d at 503 (emphasis added).